IN THE

Supreme Court of the United States

October Term, 1978
No. 77-533

JESS H. HISQUIERDO,

Petitioner,

vs.

ANGELA HISQUIERDO,

Respondent.

On Writ of Certiorari to the Supreme Court of California.

Brief Amicus Curiae of the NOW Legal Defense and Education Fund.

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INTEREST OF AMICUS CURIAE.

The NOW Legal Defense and Education Fund, Inc. ("NOW LDEF") is a non-profit civil rights organization established in 1971 to perform a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. Its parent organization, the National Organization for Women ("NOW"), is a national membership organization of over 75,000 men and women in 700 chapters throughout the country.

A major program focus of the NOW LDEF has been in the area of marital property law reform. Its activities in this regard have included the filing of an amicus brief in *In re Marriage of Fithian*, 10

Cal.3d 592, 517 P.2d 449, 111 Cal.Rptr. 369, *cert. denied* 419 U.S. 825 (1974), in which the California Supreme Court decided that federal military retirement benefits based on services performed during a marriage are an asset of the community under California community property laws. The *Fithian* decision recognizes that marriage is a partnership to which both members contribute time, energy and labor. Both members have made possible acquisition of benefits by one member; thus, each should be entitled to share those benefits.

As in *Fithian,* the resolution of the legal questions posed here necessitates a policy decision about the extent to which the economic contributions to a marriage of both partners should be recognized. The interest of the NOW LDEF in securing equal rights and, in particular, in eliminating sex bias in all aspects of marital property law, compels it to seek to participate in this case and to urge the affirmance of the decision of the California Supreme Court.

Both parties have consented to the filing of this brief, and letters of consent have been filed with the clerk pursuant to Rule 42(2).

SUMMARY OF ARGUMENT.

It is axiomatic that federal law should not preempt state law, especially where domestic relations is at issue, unless there exists a clear statement by Congress to that effect. The Railroad Retirement Act was devised to ensure that retired railroad workers and their families would have sufficient income to provide a decent living. The mere fact that Congress has not seen fit to create a divorced spouse's benefit in the Act does not represent the clear legislative determination that

divorced spouses should be deprived of their community interest in the retirement annuity. To the contrary, the failure to provide such a benefit evidences a congressional decision that divorced spouses should be protected by state family law, including community property principles. It is to state family law that divorced spouses have historically looked, and by its silence, Congress has implicitly suggested that state law should still control. Had it intended otherwise, and thereby deprived non-employee spouses of their community interest, Congress would have undoubtedly spoken in more direct terms.

Nor does a definitive legislative statement exist in the Railroad Retirement Act's anti-assignment provision, 45 U.S.C. §231m. Like similar provisions in other government benefit programs, its sole purpose is to protect the benefits of retired workers and their families from creditors, to ensure that these benefits will provide a decent degree of support in retirement. To suggest that this type of provision should pose a bar to a community property interest as well indicates a misreading of both the anti-assignment section and of community property principles. A community interest is an equal and present interest in the property, and it is irrelevant which member of the couple actually performed the work or service which generated the property. A divorced spouse has the same right and interest to a portion of the property as does the other spouse. It is an interest which is of a completely different nature than that of a business creditor, to which the provision is directed, and it would be a corruption of the goal of the anti-assignment provision to use it to deny a community property interest to a divorced spouse. Its purposes were otherwise.

Similarly, a 1974 amendment to the Social Security Act, 42 U.S.C. §659, and a definitional clarification of that section added three years later, 42 U.S.C. §662(c), do not alter the intent of the anti-assignment provision. The 1974 section was a waiver of the federal government's sovereign immunity, so that the pay and benefits of present and retired federal workers and recipients could be garnished and attached for payment of child support and alimony. Congress was concerned that the public was supporting the families of parents, especially fathers, who had abdicated their responsibilities. By waiving the government's sovereign immunity, Congress made parents with federal salaries and benefits susceptible to court orders. As an aspect of this effort, but no more, the various existing anti-assignment provisions were negated for purposes of child support and alimony, but Congress was not directing its attention to community property principles. By allowing for garnishment only to affect alimony and child support orders pursuant to 42 U.S.C. §659, Congress was devising a solution to a specific problem. It was not declaring that a community interest was more akin to a creditor's interest, and therefore should remain exempt from garnishment. Since a community interest is an ownership interest, it is at least as reasonable to assume that Congress was recognizing the logical inconsistency of allowing a wife to garnish or attach an interest which was already hers. In any case, 42 U.S.C. §659 was not the clear-cut statement demanding preemption.

Furthermore, the explicit exclusion of community property from the definition of alimony and child support, through 42 U.S.C. §662(c), was a clarification and no more. Courts differed after the passage of

42 U.S.C. §659 as to whether a community interest was garnishable, and because of the strict manner in which waivers of immunity are construed, Congress wanted to ensure that only those areas to which 42 U.S.C. §659 had been directed would be affected. Again, the amendment was not concerned with the issue of this case and, taken together, 42 U.S.C. §§659 and 662(c), do not represent a definitive congressional effort to preempt community property law; they were directed at another issue altogether.

The two Supreme Court cases involving preemption of community property laws, *Wissner v. Wissner,* 338 U.S. 655 (1950), and *Free v. Bland,* 369 U.S. 663 (1962), support Respondent's position, for they emphasize the requirement that a specific legislative intent is necessary for the preemption of state law. In *Wissner,* a provision clearly stated that only the named beneficiary of a serviceman's insurance policy should receive the proceeds, thus overriding any community interest. In addition, the law under which the policy was issued, the National Service Life Insurance Act, was an effort to encourage servicemen during the war years, and it was as an aspect of the war effort that servicemen were given inexpensive life insurance and the right to name their beneficiary. Similarly, in *Free,* the federal regulations under which the United States Savings Bonds were issued specifically allowed for the creation of a joint tenancy, with full ownership by the surviving member. Thus, when one member of a couple died, she could not leave a community property interest to her son, as her husband automatically became sole owner of the Bonds. Thus, in both instances, there was a definite effort by Congress to override state

community property interests; no such specific provision or intent exists in the instant case.

The equities also demand that the Respondent receive her community interest. Her husband will be eligible for a Social Security Act divorced spouse's benefit based on her work record, so that it is improper to suggest that the wife will receive an inequitable windfall from receipt of her community interest in the benefits. And, regardless of the specific facts of this case, it is appropriate that the wife have her share of the couple's earnings. Otherwise, in most cases, the working spouse will be able to retire with considerably more comfort than will the non-employee spouse who has contributed equally to the marriage. Congress has not spoken definitely against the fair allocation of this community asset, and preemption would therefore be inappropriate.

ARGUMENT.

I

THE GOALS OF THE RAILROAD RETIREMENT ACT ARE NOT VIOLATED BY EVALUATING RAILROAD RETIREMENT BENEFITS AS COMMUNITY PROPERTY.

A. The Presumptions in Favor of State Domestic Relations Policy Require a Forthright Federal Intent to Preempt That Policy.

In its brief as *amicus curiae,* the United States correctly notes that the issue in this case is whether a conflict exists between state and federal law with respect to the evaluation of railroad retirement benefits.[1] As this Court has recently restated, the initial assumption, in evaluating claims under the Supremacy Clause, is that state law should take precedence unless the contrary is " 'the clear and manifest purpose of Congress.' " *Ray v. Atlantic Richfield Co.,* 98 S.Ct.

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[1]Furthermore, the United States is correct that Petitioner's primary argument is essentially irrelevant. (Am.Br. 10.) That argument is premised on the theory that railroad retirement benefits may not be contractual, so that the right to receive them is not vested; consequently, they cannot be property. (Pet.Br. 9-14.) It is not this Court's obligation, however, to determine whether the California Supreme Court has correctly defined the nature of property in that state. *See Herb v. Pitcairn,* 324 U.S. 117, 125 (1954). That court has previously determined that "the community owns all pension rights attributable to employment during the marriage," *In re Marriage of Brown,* 15 Cal.3d 838, 844, 544 P.2d 561, 126 Cal.Rptr. 633 (1976), so that the vested or nonvested nature of those benefits is not relevant. *Id.,* at 846. Furthermore, that court has found that whether the fund from which the pensions are derived is contributory or non-contributory, as long as they flow from the employment relationship, they are community property. *In re Marriage of Fithian,* 10 Cal.3d 592, 596, 517 P.2d 449, 111 Cal.Rptr. 369, *cert. denied,* 419 U.S. 825 (1974). Consequently, the determination to treat railroad retirement benefits as property is, by itself, unassailable.

988, 994 (1978)(citations omitted). The presumption places the burden on the party claiming preemption to demonstrate the clear congressional purpose. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525-526 (1977).

Nowhere is the presumption in favor of state law more pronounced than in the field of domestic relations. "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *In re Burrus,* 136 U.S. 586, 593-594 (1890); *see Overman v. United States,* 563 F.2d 1287, 1290 (8th Cir. 1977); *In re Marriage of Pardee,* 408 F.Supp. 666 (C.D.Cal. 1976). This Court has explained the proper approach in this way:

> Both theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family and family-property arrangements. They should be overridden by the federal courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such interests, will suffer major damage if the state law is applied.

United States v. Yazell, 382 U.S. 341, 352 (1966). Consequently, as a result of this strong presumption, "Congress generally drafts statutes in a way that avoids conflict with state domestic relations law, [and] courts interpret them with the presumption that Congress did not intend to interfere with the operation of that body of state law." *Stone v. Stone,* ..... F.Supp. ....., ..., 192 BNA PENSION RPTR. D-3, D-5 (N.D.Cal. 1978) (appeal pending).

Thus, the California Supreme Court's determination that railroad retirement benefits are community property

should be upheld by this Court in the absence of a clear and definitive showing that a federal policy is thwarted by that determination. Neither Petitioner nor the United States has made such a showing, for the provisions upon which they rely provide no concrete evidence as to congressional intention. At most, all that can be gleaned from the statutes and their history is a concern for retired railroad workers and their families; that there existed a congressional intent that divorced spouses of such workers should be effectively denied these benefits is not apparent. In this context, where "the intent of Congress . . . is not violated by application of California's community property laws, then the status of such rights is governed by California law." *In re Marriage of Hisquierdo,* 19 Cal.3d 613, 616, 566 P.2d 224, 139 Cal.Rptr. 590 (1977).

B. The Failure of Congress to Provide for a Divorced Spouse Through a Specific Benefit Evidences an Intent That State Concepts, Including Community Property Law, Would Take Precedence.

It is undisputed that the background of the Railroad Retirement Act of 1935, from which the 1974 Act followed, evidences an intent that the benefits would "provide enough to enable retired employees to enjoy the closing days of their lives with peace of mind and physical comfort." H.R.Rep. No. 1711, 74th Cong., 1st Sess., 10 (1935). From this starting point, however, the United States hypothesizes that to reduce the guaranteed amounts for the worker by the application of community property principles is contrary to that Congressional intent. While recognizing that "the 1935 Act did not expressly prohibit the reduction of worker's benefits by application of state community property

laws" (Am.Br. 14), the United States asserts that implicit in that effort was that the entire benefit should properly belong to the worker, with nothing accruing to the nonemployee spouse. In support of this contention of implicit intent, the United States and Petitioner point to the failure of Congress to create a specific annuity for divorced spouses. (Pet.Br. 14-16; Am.Br. 15-18.)

This argument runs counter to logic. With no express language on which to rely, the United States is forced to create a non-existent intent from vague legislative history and from the absence of a provision for which there is no explanation. The argument necessarily assumes that the purpose of the Act precluded consideration of nonemployee spouses. Under this approach, the purpose was simply to ensure the economic security of the worker, without regard to a spouse.[2] Any rational interpretation of the statutes and legislative history, however, indicates that Congress was concerned with the economic security of retired railroaders' spouses as well. Yet the end-point of the United States' rationale is that *any* diminution of the retiree's annuity, even

[2]The very fact that Congress decided to provide a spouse's benefit indicates its interest in the families of workers, as opposed to just the workers themselves. The House Report on that legislation underlines this concern and belies the United States' depiction of the Act as directed solely at railroaders themselves:

> For several years now the scale of the benefits to retired railway workers and their families has lagged far behind the steadily rising cost of living. This has produced a situation that cannot and should not be ignored any longer. The condition of some of these retired workers and their families, whom we seek to aid by increased benefits, is desperate. They need help and they need it now without further delay.

H.R.Rep. No. 976, 82d Cong., 1st Sess. (1951), in 1951 U.S. Code Cong. & Admin. News, 2529.

to support a present spouse, "would have been inconsistent with the Act's objectives." (Am.Br. 14.)

The fallacy of this argument is underscored by the suggestion that application of community property principles in this context is somehow different than that of support principles. The United States notes that forcing the retiree to give up one-half of the annuity attributable to the marriage years would threaten the worker's economic security, thus violating the purpose of the Act. But it is suggested at the same time that that same economic security would not be threatened where a court ordered alimony payments. (Am. Br. 14-15.) Inasmuch as alimony payments, or child support, might encompass as much as community property, it is difficult to see how this inference has been drawn.

The fact that it is an inference, and no more, is in large part accountable for its illogic. The United States describes the goals of the 1935 Act in terms which effectively exclude the nonemployee spouse from consideration, whether or not the marriage is still existent. Once that is accomplished, it is then a simple matter to suggest that the division of benefits under community property principles violates the Act, for it necessarily diminishes the amount available for the individual who has retired. This analysis of the goal of the Act is irrational. When Congress was creating the benefit program, it was considering the well-being of the workers' spouses, as well as that of the workers. Their economic security was also at stake; it was in part on their behalf that the railroader was working.

In an effort to bolster this approach, however, Petitioner and the United States both suggest that Con-

gress has spoken clearly—albeit, silently—by not providing annuities for divorced spouses. Again, the United States recognizes that a divorced spouse may share in retirement benefits anyhow, due to alimony, thus reducing the amount that the employee spouse has to live on, but the United States argues that the burden on the retired worker is greatly increased—and, apparently, qualitatively different—under the influence of community property principles. Division on that theory will "increase this 'divorce penalty' without any showing that a further reduction in a worker's available benefits is justified by the respective conditions of the parties." (Am.Br. 16.) Unfortunately, it is not explained how alimony payments and a community property division are distinguishable in this context. Both result in payment of part of the benefits to the nonemployee spouse, despite the fact that Congress specifically "declined to provide a (divorced) spouse's benefit. . . ." (Am.Br. 15.)[3]

Still, the United States concludes that the decision not to create a divorced spouse's benefit "reflect[s] a determination that the finite resources of the Railroad Retirement Fund should be expended for the benefit of retired workers and their children rather than divorced wives." (Am.Br. 18.) This analysis represents a failure to comprehend the most basic principles of

[3]No answer is forthcoming from the legislative history quoted in the United States' Brief at 16-17. That discussion focuses on whether benefits should go to a divorced spouse after the death of the employee spouse. There is no issue in this case regarding the payment of benefits after the death of the former employee. Furthermore, the reason offered in this testimony for not providing such benefits—that to do so would reduce payments to surviving children—has no relevance to this case, as there is no suggestion here that a higher combined benefit should be paid to a divorced couple than is paid to an individual former employee.

domestic relations. The logic suggests that nonemployee former spouses should be cut adrift economically as if they had contributed nothing to the marriage and were therefore completely undeserving. It also ignores the reality that, in most states, alimony would probably result in the divorced nonemployee spouse receiving a part of the "finite resources of the Railroad Retirement Fund." It is inconceivable that Congress would have suggested—implicitly or explicitly—that no part of the Railroad Retirement benefits could be paid to a divorced spouse as alimony. Yet, Petitioner and the United States argue that implicit in the congressional decision not to award a divorced spouse's benefit is an intent that these benefits should not be available through community property laws. In short, to the extent that there exists a "divorce penalty," it is no more reasonable to read an intent by Congress to preempt community property laws than it is to see an intent to preempt alimony laws.[4]

In attempting to devise an intent where there is none, the United States goes to great pains to explain a rationale which simply does not exist. The California Supreme Court has previously noted that a congressional concern for one class of possible recipients demonstrates little with respect to others. "It is not incongruous for Congress to supply a program to aid widows, who no longer have husbands to provide sustenance, and omit to do so for ex-wives who can rely on state family law concepts of support, alimony,

[4]"Community property laws are as integral a part of a state's domestic relations laws as its support laws, so the federal policy of noninterference with state domestic relations policy . . . applies to both kinds of law." *Stone v. Stone, supra,* ..... F.Supp., at ....., 192 BNA PENSION RPTR., at D-9.

and community property for a source of income." *In re Marriage of Fithian, supra,* 10 Cal.3d at 600. Relying on this common-sense approach, that court states in its opinion below that

> [i]t seems unlikely that Congress proposed to leave a divorced spouse without any assistance whatever stemming from the employee's entitlement to a pension during marriage. Rather, . . . the fact that Congress made no provision for a former spouse in the act is more rationally explained by its reliance upon state property law to protect an ex-wife's interest in the railroad employee's annuity.

19 Cal.3d at 618. As non-wage-earning spouses have traditionally relied upon state law on divorce, it seems undeniable that Congress would have deprived them of that opportunity only through an explicit effort, and not in the backhanded, passive manner that the United States and Petitioner here suggest.[5]

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[5]Although Amicus NOW LDEF embraces neither the results nor the rationale, there is at least some logic in two decisions by the California appellate courts which apply the inverse of the *Fithian* rationale to Social Security benefits. In *In re Marriage of Nizenkoff,* 65 Cal.App.3d 136, 140, 135 Cal.Rptr. 189 (1976), the Court of Appeal wrote: "As Congress expressly provided for the interests of a divorced wife in the social security system, it did not intend that they rely on state family law concepts of support, alimony and community property." *See also In re Marriage of Kelley,* 64 Cal.App.3d 82, 99, 134 Cal.Rptr. 259 (1976). In the social security scenario, therefore, Congress has taken an active role with respect to the provision of benefits to a divorced spouse. It would still not appear to be sufficient to preempt state community property laws, but at least it represents a positive statement. In the railroad retirement situation, however, Congress has said nothing regarding benefits for divorced spouses, and it therefore is a leap of faith to infer that the intent was to deprive them of any railroad benefits, even through the operation of state law principles. Indeed, if that logic is carried to its conclusion, then just as a nonemployee former spouse should receive no railroad retirement benefits, either through the Act or by the operation of state law, then so should nonemployee former spouses of a Social Security-covered individual receive *both* divorced benefits under the Social Security Act and a community interest in the employee spouse's own Social Security benefits. The comparative injustice of that result indicts the logic as well.

Petitioner and the United States thus construct a convoluted reading of congressional intent which results in the eradication of a property interest guaranteed by state law. Logic, however, compels the opposite conclusion, that by excluding divorced benefits, Congress sought to leave the protection of divorced individuals' interests to state law principles. Given the strong presumption in favor of state domestic policy, it seems inconceivable that Congress' silence on divorced spouse benefits represents an intention that they receive nothing. Had Congress meant to take such a drastic step—the preemption of state domestic policy with no replacement mechanism—it surely would have spoken directly to the issue. *See, e.g., infra,* at p. 28, n.12.

II

NO FEDERAL LAW PRESENTS A DEFINITIVE MANDATE FOR PREEMPTION OF COMMUNITY PROPERTY LAWS.

Both the United States and Petitioner reserve a substantial portion of their arguments for the contention that the anti-assignment provision of the Act, 45 U.S.C. §231m, in conjunction with recent Social Security Act provisions creating exceptions to that section, represents the definitive statement of Congress supporting preemption. Specifically, they argue that the anti-assignment clause, which includes a provision that benefits may

not be anticipated, is a direct attack on the provision of retirement benefits to a nonemployee spouse under community property principles. "Community property divisions of benefits, whether called 'assignments' or 'anticipations' of benefits, would fall within the scope of this prohibition." (Am.Br. 18.) But as the California Supreme Court pointed out, the "purpose of [§231m] is to assure that railroad annuities not yet paid to the beneficiary are exempt from the claims of creditors." 19 Cal.3d at 617. Neither that section itself, nor the cited provisions of the Social Security Act, can support the argument that community property laws have been preempted by this provision. An analysis of these provisions and of community property law demonstrates the fallacy of the argument.

A. The Anti-Assignment Provision Was Established Solely to Protect Recipients of Government Retirement Benefits From the Demands of Creditors.

The anti-assignment clause was part of the original Railroad Retirement Act. The legislative history does not specify a purpose, other than that it was intended to ensure "that no annuity payments shall be assignable or shall be subject to any tax or legal process." H.Rep. No. 1711, 74th Cong., 1st Sess., 12 (1935). The goal, however, appears to be self-evident: to insulate families' retirement funds from the grasp of creditors. *See Freedom Finance Co. v. Fleckenstein,* 116 N.J. Super. 428, 282 A.2d 458, 460 (1971). Similar provisions exist in virtually every government benefit program;[6] one has recently been applied as well to private

[6]*See, e.g.,* 38 U.S.C. §3101(a) (Veterans benefits); 10 U.S.C. §1440 (military retirement benefits); 42 U.S.C. §407 (Social Security benefits); 5 U.S.C. §8246(a) (Civil Service Retirement benefits).

pension benefits. 29 U.S.C. §1056(d). The policy behind exempting such benefits from creditors goes back at least to 1873, when Congress first exempted veterans' benefits from creditors' claims as well as from taxation. *Porter v. Aetna Casualty and Surety Company,* 370 U.S. 159, 160 & n.2 (1962).

The cases are replete with references to the purposes of these anti-assignment provisions as intending to protect retirees from creditors. "[L]egislation of this type should be liberally construed . . . to protect funds granted by the Congress for the maintenance and support of the beneficiaries thereof . . . ." *Porter v. Aetna Casualty and Surety Company, supra,* 370 U.S. at 162; *see also Philpott v. Essex County Welfare Board,* 409 U.S. 413 (1973); *In re Vary,* 65 Mich.App. 447, 237 N.W.2d 498 (1975), *aff'd* 401 Mich. 340, 258 N.W.2d 11 (1977); *Stone v. Stone, supra,* .... F.Supp. at ...., 192 BNA PENSION RPTR., at D-6. At the same time, by protecting beneficiaries from creditors, Congress did not suggest that dependents of the beneficiaries, for whom the protection was in part created, *see In re Vary, supra,* 237 N.W.2d at 500, would be treated as similar to creditors and left to fend for themselves. "It would be ironic indeed if a provision designed in part to ensure that an employee spouse would be able to meet his obligations to family after retirement were interpreted to permit him to evade them with impunity after divorce." *Stone v. Stone, supra,* .... F.Supp. at ...., 192 BNA PENSION RPTR., at D-6. It is myopic to assume that the purpose of these anti-assignment provisions was to insulate recipients from their families as well as from creditors; just as these benefits were expected to protect beneficiaries and their families before divorce.

they should be similarly interpreted after the couple has separated.

Yet the United States argues that the community property interest of a spouse is essentially no different than the interest of a creditor. (Am.Br. 20-21.) It rejects the California Supreme Court's evaluation which distinguishes a creditor from a community property "owner with a 'present, existing, and equal interest.'" *In re Marriage of Hisquierdo, supra,* 19 Cal.3d at 616, quoting *Phillipson v. Board of Administration,* 3 Cal.3d 32, 44, 473 P.2d 765, 89 Cal.Rptr. 61 (1970). This analysis, the United States contends, merely "beg[s] the question," (Am.Br. 20-21); in fact, it is at the crux of the issue, for the nature of the interest of a divorced spouse is precisely what is at stake in this case. A brief analysis of community property law is necessary in order to understand how the anti-assignment provisions are inapplicable.

B. A Community Property Interest Is Not Like That of a Creditor.

One commentator describes community property to include

> all property which stems from the labors of either spouse during the marriage, irrespective of direct contributions to its acquisition or the condition of title. . . . The spouses are seen as contributing equally to acquisition regardless of the actual division of labor in the marriage and regardless of which spouse actually "earned" the property.

Prager, *The Persistence of Separate Property Concepts in California's Community Property System, 1849-1975,* 24 U.C.L.A. L.Rev. 1, 6 (1976) (footnote omitted).

Another sees the rights of the nonemployee spouse as arising "from the fundamental principle of community property law that both spouses participate in the community and both are entitled to share in its rewards." Note, *Dividing the Community Property Interests In Nonvested Pension Rights,* 65 Calif.L.Rev. 275, 279 (1977). By statute in California, "the respective interests of the husband and wife in community property during continuance of the marriage relationship are *present, existing and equal interests.*" Cal. Civ. Code §5105 (emphasis supplied). As early as 1859, the California Supreme Court described the principle in these terms:

> [T]he marriage, in respect to property acquired during its existence, is a community of which each spouse is a member, equally contributing by his or her industry to its prosperity, and possessing an equal right to succeed to the property after dissolution. . . . All property is common property, except that owned previous to marriage or subsequently acquired in a particular way. The presumption, therefore, attending the possession of property by either, is that it belongs to the community. . . .

Myer v. Kinzer, 12 Cal. 247, 251-252.[7]

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[7]*See also* Verrall & Sammis, *California Community Property,* at 3; Note, *Retirement Pay: A Divorce In Time Saved Mine,* 24 Hast.L.J. 347, 354 (1973).

The California approach is similar to that of the seven other states which apply community property principles. "Under the usual provisions of the statutes in the community property states, all property which is acquired during the existence of the marriage relation, other than that which the statutes specifically designate as separate because of a particular manner of acquisition, is community property. . . ." 41 C.J.S., "Husb. & Wife," §471(a), at 471. *See* Ariz.R.S. §25-211; *Mortensen*

(This footnote is continued on next page)

Community property is therefore not comparable to a creditor's interest. It is an interest which comes into existence at the time that the work or service is performed. The spouse who has not worked has an interest in the property from the beginning, not at some arbitrary date in the future when the property is actually divided. This is a key distinction from alimony, which is a discretionary award by the court in order to insure that the spouse with a lesser income is properly cared for after the separation. *In re Marriage of Brown, supra,* 15 Cal.3d at 848-849. Community property, by contrast, "should be [the spouse's] as a matter of absolute right." *In re Marriage of Peterson,* 41 Cal.App.3d 642, 651, 115 Cal.Rptr. 184 (1974), as quoted *id.,* at 848.[8]

In California, creditors receive special treatment. Attachments may be issued against an individual, for instance, "only on a claim which arises out of the conduct of the individual of a trade, business, or profession." Cal. Code Civ. Proc. §483.010. As that provision's legislative comment notes, its purpose was to "limit attachment to cases arising out of commercial transactions." Attachment would thus not be authorized to secure a community property interest. Consequently,

v. Knight, 81 Ariz. 325, 305 P.2d 463 (1946); Idaho C. §32-906; *Ramsey v. Ramsey,* 96 Idaho 672, 535 P.2d 53 (1975); La. Civ.C. §2398; *Succession of Hyde,* 281 So.2d 136 (La.App. 1973), *aff'd* 292 So.2d 693 (La. 1974); N.R.S. §123.220; N.M.R.S. §57-4A-6(A); *LeClert v. LeClert,* 80 N.M. 235, 453 P.2d 755 (1969); Tex.F.C. §5.01; Wash.R.C.A. §26.-16.030; *Graham v. Radford,* 71 Wash.2d 752, 431 P.2d 193 (1967).

[8]Additionally, it should be noted that in all community property states except Louisiana, the wife has the right to manage the community property during marriage, a right which a creditor surely never has. K. Davidson, R.B. Ginsburg, H.H. Kay, *Sex-Based Discrimination Text, Cases and Materials,* 164-169 (1974), supplement by R.B. Ginsburg and H.H. Kay (1978).

the United States' argument that the California Supreme Court was begging the question with its distinction between a community property interest and a creditor's interest is, in fact, the unrealistic approach. The interest of the nonemployee spouse, unlike that of a creditor, is exactly the same as the interest of the working spouse. Both have the same rights with respect to the income, and both obtain those rights at the same time. The nonemployee spouse does not suddenly become possessed of her interest in the community property on the date that the divorce court divides that property; the interest has always existed, and she is merely attempting to vindicate a property interest which is and always has been her own. Consequently, the interest of the nonemployee spouse, just like the interest of the other, exists prior to the operation of any anti-assignment statutes; that interest is no more an assignment of the benefits of the employee spouse than could the interest of the employee spouse be considered an assignment of the benefits of the other. The nonemployee spouse is not laying claim to the property of the employee spouse; she is seeking to have the court designate exactly what that property is.

Thus, the definition of this interest as a community interest is a significant aspect of this issue. Lying behind these definitions, however, are the policy considerations which demand that a nonemployee spouse's community property interest not be treated like a creditor's interest.[9] The primary policy factor lies in the

[9]In *Stone v. Stone, supra,* Judge Renfrew recently considered this same issue with respect to the anti-assignment provision of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1056(d). While determining that the definitional distinction between a community interest and

(This footnote is continued on next page)

purpose of the anti-assignment provision, which is, as previously noted, to ensure that former railroaders and their families have income protected from creditors. It seems incredible that Congress, which provides a benefit for railroaders' spouses, 45 U.S.C. §231a(c)(1), would completely disregard those spouses after divorce. Rather, since Congress has not chosen to provide a divorced spouse's benefit, it is apparent that Congress contemplates that the benefits will continue after divorce in the form of community property. Judge Renfrew's analysis in *Stone* is equally compelling in this context: "Construing [ERISA's anti-assignment provision] to prevent a nonemployee spouse from enforcing marital property obligations against an employee benefit plan covered by ERISA would frustrate rather than further the policies of that provision." ..... F.Supp., at ....., 192 BNA PENSION RPTR., at D-6.

The community property interest of a divorced spouse is different than that of a business creditor. Whereas the latter is never protected by an anti-assignment provision, the former has the protection during the period of the marriage; the mere termination of the marriage should not defeat the purposes behind the anti-assignment provision, and prevent the nonemployee spouse from obtaining a portion of the property which, previously, had been protected by the provision. Also, the employee spouse is in a considerably more vulnerable position than is a creditor. More than a creditor, that spouse is likely to be dependent on the benefits, for the creditor will probably have "a variety of cus-

a creditor's interest did not alone resolve the problem, he found that the policy considerations underlying the distinction precluded application of ERISA's anti-assignment provision to a community property interest. ..... F.Supp., at ....., 192 BNA PENSION RPTR., at D-6 through D-9.

tomers who own a variety of assets which can be used to satisfy their debts. The nonemployee spouse has a unique and protected interest in obtaining her fair share of pension benefits." *Id.*, ... F.Supp., at ....., 192 BNA PENSION RPTR., at D-6. Furthermore, unlike a creditor, that spouse has not taken a business risk by extending credit to someone who is not in a position to repay. Instead, the spouse has merely been cut adrift economically, and regardless of whose "fault" the divorce may have been, he or she should not be treated as if a business effort had failed.

Petitioner and the United States argue that the treatment of these benefits as community property will result in great loss to retired railroaders. Their arguments, however, strongly imply that it is appropriate that the nonemployee spouse be reduced to a life of poverty so that the retiree will not be inconvenienced. This approach assumes, of course, that his right to a decent income is greater than his former wife's—presumably because he did the actual labor.

> [B]ut his claim is not superior to his wife's. Although the employee spouse may have assumed the obligation to provide the money to support the couple, the nonfinancial contributions of a nonemployee spouse are no less essential or valuable to a marriage, and ERISA does not reject the basic premise of the community property laws that each partner in a marriage deserves an equal share of all marital assets because each made their acquisition possible.

Id., ... F.Supp., at ....., 192 BNA PENSION RPTR., at D-7.

Community property principles recognize the contributions of the nonemployee spouse. From that recognition, it necessarily follows that the nonemployee spouse will be treated equally with the retired railroader. To ignore those principles is to reward the husband who divorces his wife at the end of his working life; despite her efforts, she receives nothing, while the husband will have all of the benefits. The alternative is the only just treatment of these benefits. Preemption of the "community property laws would protect a small and relatively undeserving minority of employee spouses at the expense of a large and relatively deserving majority of nonemployee spouses." *Id.*, ... F.Supp., at ....., 192 BNA PENSION RPTR., at D-7 (footnote omitted).

C. The Congressional Decision to Waive the Government's Sovereign Immunity in Order to Permit the Garnishment and Attachment of Federal Benefits and Pay for Purposes of Child Support and Alimony Does Not Dictate Preemption of a State's Community Property Laws.

The United States also attempts to demonstrate that, all else being equal, the preemption of the community property laws by the anti-assignment provision is supported and required by the exception to that provision and its definitional amendment. (Am.Br. 18-20). It is asserted that section 459 of the Social Security Act, 42 U.S.C. §659, which allows for garnishment of government benefits to satisfy alimony and support orders, and the clarifying section added three years later, 42 U.S.C. §662(c), which explicitly excludes community property from the definition of alimony and support, represents the specific Congressional state-

ment that state community property laws should be preempted. An evaluation of the history and purpose of these sections, however, does not indicate any definitive Congressional purpose with respect to this issue; rather, it demonstrates only that Congress may view community property in a different light than it does support and alimony. Contrary to the government's contention, however, that viewpoint could as easily be a recognition that community property is an existing ownership interest, thus rendering an anti-assignment provision irrelevant.

Section 459 of the Act was a late addition by the Senate to H.R. 17045, the Social Services Amendments of 1974. It was lifted from a similar Senate effort of the previous year.[10] Its history demonstrates that Congress was not the least concerned with the issue which is the subject of this case. Rather, the provision was an aspect of a broad attack on the problem of absent fathers, who, while avoiding their support responsibilities, were forcing the state and federal governments to support their families through the Aid to Families with Dependent Children ("AFDC") program.

> The problem of welfare in the United States is, to a considerable extent, a problem of the non-

[10]H.R. 17045 was introduced on October 3, 1974, 120 Cong.Rec. 33737 (daily ed., Oct. 3, 1974), and passed by the House two months later. 120 Cong.Rec. 38614-38619 (daily ed., Dec. 9, 1974). The Senate then made a number of amendments, including the addition of the provision from the last session. The Senate Finance Committee's discussion of the 1973 provision was adapted virtually unchanged as the Report on the 1974 provision. *Compare* S.Rep. 93-553, 93d Cong., 1st Sess., at 39 ff., *with* S.Rep. 93-1356, 93d Cong., 2d Sess., in 1974 U.S. Code Cong. & Admin. News, at 8145 ff. For the remainder of this discussion, reference will be made only to the latter authority.

> support of children by their absent parents. . . . The Committee believes that all children have the right to receive support from their fathers. The Committee bill . . . is designed to help children attain this right. . . .

1974 U.S. Code Cong. & Admin. News, at 8145-8146.

One resolution was to allow the garnishment and attachment of pay and benefits of present and former federal employees. Unfortunately, the garnishment of these monies was viewed as a violation of the government's sovereign immunity, *id.*, at 8156; *see Applegate v. Applegate,* 39 F.Supp. 887, 889-890 (E.D.Va. 1941). It was, therefore, in response to this "statutory barrier to collecting from military personnel and Federal employees" that the provision was enacted. 1974 U.S. Code Cong. & Admin. News, at 8147. Congress was not concerned with the anti-assignment provisions, but with the larger problem of collecting from recalcitrant parents, primarily fathers, who were receiving federal pay or benefits for themselves and simultaneously forcing the public to support their wives and children.

Section 459 had a limited purpose. It did not create a right to garnishment; it "simply abrogate[d] the Government's immunity to the realization of this right if such a right exist[ed] under state law." *Wilhelm v. U.S. Dept. of Air Force, Accounting and Finance Center,* 418 F.Supp. 162, 164 (S.D.Tex. 1976).[11] It was intended merely as a way to force the United States to "respond to garnishment as a private person for

[11] *See also Marin v. Hatfield,* 546 F.2d 1230, 1231 (5th Cir. 1977); *Popple v. United States,* 416 F.Supp. 1227, 1228 (W.D.N.Y. 1976); *Bolling v. Howland,* 398 F.Supp. 1313, 1316 (M.D.Tenn. 1975).

similar legal process and only to that extent." *Overman v. United States, supra,* 563 F.2d at 1292. It was directed not merely at retirees, but at all recipients of federal funds who would otherwise be able to misuse governmental immunity. The retirees were merely a portion of those who fit into this category.

The effect of section 459 on various anti-assignment provisions was a necessary by-product of the larger effort—elimination of the immunity. There is virtually no discussion in the legislative history of this aspect of the provision. In both the "original" legislative history, S.Rep. 93-553, and its descendant, S.Rep. 93-1356, one lone sentence appears at the end of the analysis, noting this result: "[Section 459] would also override provisions in various social insurance or retirement statutes which prohibit attachment or garnishment." 1974 U.S. Code Cong. & Admin. News, at 8157.

Despite the Senate's changes, the Social Services Amendments of 1974 moved swiftly through Congress, apparently in an effort to pass it before the term ended. The Senate reported the House bill back with amendments on December 14, 1974, 120 Cong.Rec. 39916 (daily ed., Dec. 14, 1974), and passed it three days later. 120 Cong.Rec. 40358 (daily ed., Dec. 17, 1974). A joint conference was immediately appointed, which produced a report, H.R.Rep. 93-1643, in two days. That report was discussed in the House the next day, and the discussion indicates that Rep. Ullman, one of the sponsors of the bill, was anxious to ensure that the House would pass the bill with the Senate amendments because of his belief that the government was spending large amounts of money supporting families whose fathers were paid by the federal government.

One representative, however, expressed some concern as to the breadth of the immunity waiver. After reading it aloud, Rep. McFall stated: "Child support I can understand. Alimony payments is a rather drastic addition." Rep. Ullman responded: "I think this Congress is going to have to face up to a very serious deteriorating situation where the government is paying out money to individuals who are not living up to their family responsibilities. . . ." 120 Cong.Rec. 41809 (daily ed., Dec. 20, 1974).

This exchange is the closest that anyone came to a discussion of the provision's impact in this area. It indicates that even in the rush to pass the bill, there was some concern that Congress was doing too much too quickly. It suggests something else, however: if Congress had decided to limit the effect of the provision only to child support, as Rep. McFall suggested, would that limitation now be interpreted by the United States to mean that section 459 represented a legislative decision that alimony was preempted by federal law in the same way that it is here argued that community property has been preempted?

That rhetorical inquiry should indicate the weakness of the United States' position. Effectively, the United States suggests that a bill, the purpose of which was to eliminate sovereign immunity in specific situations, is the strong congressional statement that state community property laws were preempted by the Railroad Retirement Act. It is a connection which is tenuous at best.[12] Congress had something completely different in mind—the end of public support, through the AFDC

[12]That Congress is perfectly capable of speaking directly to preempt community property interests is evidenced by the Internal Revenue Code, *see* I.R.C. §§219(c)(2), 911(c)(3),

program, of families in which a federally-paid parent had abdicated all responsibility—and, to accomplish this, it was necessary to pass a provision waiving the government's sovereign immunity. As a necessary by-product of that, the anti-assignment provisions had to be abrogated as well, but it was hardly a key aspect or consideration of the bill.

To the extent that an approach to community property can be read into section 459, it is equally reasonable to suggest that Congress viewed community property as not relevant to this issue. If community property is properly recognized as an ownership interest, rather than as the court-created debtor interest in the property of another that alimony and child support amount to, then it seems reasonable to presume that Congress recognized that an exception to the anti-attachment provision would not be applicable to community property. How could an individual garnish or attach property which already belonged to her?

Ultimately, one can only speculate as to the congressional intent with respect to the effect of the anti-attachment provisions and section 459 on community property. The suggestion of the previous paragraph, however, is no more speculative than that suggested by Petitioner and the United States: that Congress was decisively stating that railroad retirement benefits were not subject to division under community property principles. Congress was concerned with sovereign immunity and support problems. It moved with great haste to resolve those issues, but in doing so, it did not speak to the issues of this case.

43(c)(2)(B)(ii), 1303(c), 1304(c)(3)(B), and 6013(e)(2)(A), as well as in the Social Security Act itself, *see, e.g.*, 42 U.S.C. §411(a)(5)(A). *See also* 20 C.F.R. §404.350(d) (1977).

The United States also contends that the recent clarifying amendments to section 459, codified at 42 U.S.C. §652, provide further support for its analysis. "It is apparent from the terms of Public Law 95-30 [42 U.S.C. §652] . . . that Congress intended to distinguish between payments necessary for 'support' and payments based on the economic efforts of the parties during marriage." (Am.Br. 20.) But subsection (c) of those amendments, which contains the definition of "alimony" that explicitly excludes "community property" from that term for purposes of 42 U.S.C. §659, adds little to an understanding of these sections. Rather, it simply underscores what Congress had intended all along, that support for a divorced spouse would be garnishable from federal benefits, whereas community property, which is a recognition of an existing property interest, would not be included within this exception to the government's sovereign immunity.

The discussion on the Senate floor illustrates this point. In addition to the statement of the bill's sponsor, Senator Nunn, as quoted by the United States (Am.Br. 19), this exchange between Sens. Nunn and Curtis took place:

> MR. CURTIS: These amendments are in the nature of refining amendments to that which is already in the law, is that correct?
>
> MR. NUNN: That is correct; yes.
>
> MR. CURTIS: To implement that which has already been done?
>
> MR. NUNN: That is right, particularly the garnishment section on Federal employee wages.

123 Cong.Rec. S6723 (daily ed., April 29, 1977). In short, the definitional amendmnets, from which the

United States derives such significance, were no more than an effort to put in explicit terms that which had already been stated in broader terms. It did not alter the thrust of section 459; it only made clear that section 459 was applicable specifically to alimony and child support payments, and not to community property. This had always been true; it simply had not been specifically stated.

Pub.L. 95-30 reiterated the importance of eliminating the sovereign immunity defense so that federal benefits could be attached and garnished.[13] It did not represent the definitive congressional statement that community property laws should be preempted by the anti-attachment provisions of the Railroad Retirement Act. It merely focused on the problem that Congress was attempting to resolve, so that the courts would not read more into section 459 than had been intended. Statutes waiving sovereign immunity are to be strictly construed, *McMahon v. United States,* 342 U.S. 25, 27 (1951), and suits should be allowed only when that immunity has been clearly waived. *McMahon v. United States, supra; Flora v. United States,* 357 U.S. 63, 65 (1958); *United States v. Sherwood,* 312 U.S. 584 (1941). Congress was apparently concerned that courts would allow a broader waiver of this immunity than had been intended.[14] This specification of the limits of

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[13]"[T]he question of whether such moneys will be subject to legal process will be determined in accordance with State law in like manner as if the United States were a private person." 120 Cong.Rec. S6727 (daily ed., April 29, 1977).

[14]After section 459 was passed, courts were in disagreement as to whether community property interests were garnishable. *Compare, e.g., Williams v. Williams,* 338 So.2d 869 (Fla. App. 1976); and *United States v. Stelter,* 553 S.W.2d 227 (Tex.Ct.Civ.App. 1977) (allowing garnishment of community

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waiver, however, did not amount to a determination that a community interest in retirement benefits was comparable to a creditor's interest.[15] It only clarified the congressional intent which lay behind the passage of section 459 several years earlier.

III

PRIOR SUPREME COURT DECISIONS DO NOT SUPPORT PREEMPTION OF COMMUNITY PROPERTY PRINCIPLES IN THIS INSTANCE.

Petitioner and the United States rely on two decisions from this Court which determined that state community property principles were preempted by federal law. These cases, *Wissner v. Wissner*, 338 U.S. 655 (1950), and *Free v. Bland*, 369 U.S. 663 (1962), actually support Respondent's position, however, for they demonstrate the necessity of a clear federal mandate to preempt state domestic policy.

In *Wissner*, a soldier had purchased a National Service Life Insurance policy, naming his mother as beneficiary. When he died in the service in 1945, his wife sought the proceeds of the policy; the California courts awarded her one-half of those proceeds as the community property interest. In a 5-3 decision, however, this Court determined that the National Service Life Insurance Act, 38 U.S.C. §801 *et seq.*, preempted

property interests) *with Kelley v. Kelley*, 425 F.Supp. 181, 182 (W.D.La. 1977) ("Plaintiff is claiming a property right, while the immunity surrendered under 42 U.S.C. §§652-660 deals only with child support and alimony."); and *Marin v. Hatfield*, 546 F.2d 1230 (5th Cir. 1977) (disallowing garnishment of community interests). Consequently, to resolve this apparent confusion, Congress passed 42 U.S.C. §662(c), which was merely a summary declaration of pre-existing law.

[15] *But see Stone v. Stone, supra,* ..... F.Supp. ....., at ....., 192 BNA PENSION RPTR., at D-8 (*dictum*).

state community property principles. The decision rests on a recognition of the overall purposes of the Act, on the existence of a specific section for the naming of a beneficiary, and on an anti-assignment provision. 338 U.S., at 658-660.

First, the Court determined that a "liberal policy toward the serviceman and his named beneficiary is everywhere evident in the comprehensive statutory plan." *Id.*, at 658. In the instant case, however, it has already been demonstrated that no such policy exists; to the contrary, the apparent purpose of the Railroad Retirement Act is to ensure that both retired workers and their families are adequately protected in retirement. Loss of the nonemployee spouse's interest would run counter to that policy.

Secondly, and most importantly, *Wissner* is dependent on a specific provision in the Act which allowed the serviceman to designate his beneficiary. Congress spoke "with force and clarity in directing that the proceeds belong to the named beneficiary and no other." *Id.*, at 658. It is this section which most distinguishes *Wissner* from the instant situation. Here, congressional intent has been vague at best, and there is no specific statement that Congress sought to deprive nonemployee spouses of the benefits to which they, as partners in the marriage, gained entitlement. As the California Supreme Court stated:

> [T]he fundamental premise of *Wissner* was that Congress intended a serviceman to have an absolute right to change his beneficiary and that to require the designated beneficiary to pay over the proceeds of the policy to the widow would frustrate that intent.

In re Marriage of Hisquierdo, supra, 19 Cal.3d at 618. In the absence of such a specific requirement, there is no basis on which to find a federal preemption.

As further support for its position, this Court found that the anti-attachment provision of the National Service Life Insurance Act conflicted with the spouse's community interest. Again, though, that is distinguishable from this case, as the remainder of that statute was adamantly clear that the proceeds of the policy were for the named beneficiary alone, so that the anti-assignment provision was in part designed to ensure that that individual alone would receive the entitlement.

In addition, there is a considerable difference between life insurance proceeds and retirement benefits. In the former situation, there is no guarantee that there will be any return at all; it is more in the nature of gambling. Furthermore, the input which generates that return is merely that small portion of the couple's community property which is used to buy the policy. In the instant situation, however, both the investment and return are of a different character. The return, a retirement annuity, is not premised on a speculative condition such as the death of the insured. It is more akin to deferred compensation, and although railroad retirement benefits have not been found by this Court to be contractual, there is a degree of certainty that those benefits will be forthcoming if the work is performed. Similarly, the "investment" is one of a lifetime, performed by both parties to the marriage. The working spouse, of course, makes a direct investment in those benefits, and the nonemployee spouse renders the contribution of the other possible. Retirement benefits, thus, are payment for the lifetime

efforts of the couple; life insurance benefits, especially during a war, more resemble a lottery pay-off. In *Wissner,* an important national policy was upheld by permitting soldiers to name their beneficiary and be certain that that beneficiary would receive the proceeds, but in this instance, a lifetime of contribution to a marriage is forfeited if the community interest is not recognized. It is a significantly greater loss than that sustained in *Wissner.*

Consequently, it is logical, especially in light of the provision specifically designating a beneficiary, to ensure that creditors could not obtain any of the proceeds of a policy. In the *Wissner* situation, the wife more resembled a creditor, as she was attempting to recover the return from the investment of a small part of her community property interest. In this instance, though, she is seeking something more significant: the return from the full contributions of married life. This Court noted that "the community property principle rests [in part] upon . . . the moral obligations of supporting spouse and children," 338 U.S., at 660; that obligation would appear to require that a husband not be relieved of his responsibility by eliminating his wife's community interest. The anti-attachment provision in *Wissner* could legitimately be read to ensure that a beneficiary received the full proceeds that the serviceman intended. But to read a similar intent in the Railroad Retirement Act's comparable provision would be to give the husband a windfall and to deprive the wife of any return from her years of investment.

Finally, one other aspect of *Wissner* deserves mention. The National Service Life Insurance Act was created to "enhance the morale of the serviceman"

during the war years. *Id.*, at 660. The program was a "legitimate [end] within the congressional powers over national defense." *Id.*, at 660-661. In short, *Wissner* must be read in terms of the national crisis which existed at the time that the Act was promulgated, a time when government held special powers to take extraordinary measures to protect the country. As one commentator has described it, "*Wissner* is a case of congressional preemption of state community property laws by exercise of the federal war and defense powers." Reppy, *Community and Separate Interests in Pensions and Social Security Benefits after Marriage of Brown and ERISA*, 25 U.C.L.A. L.Rev. 417, 487 (1978). Such an overriding federal concern does not exist in the instant situation;[16] instead, the concern appears to be with the well-being of retirees and their families.

In short, the *Wissner* decision was directed at an aspect of a national emergency, and recognized that the selection of a beneficiary was one means of helping to resolve this emergency. There was a specific provision allowing the individual who had determined to buy the policy to direct who would receive it, and a more general policy to encourage servicemen to choose their beneficiary. None of these elements exists in this case.

Free v. Bland, supra, involved merely the testamentary power of a wife. A Texas couple purchased United States Savings Bonds, which, under federal regulations, were issued in joint tenancy. The regulations specifically detailed the right of full ownership in the surviving spouse, 369 U.S., at 667-668 & nn. 5, 6, but the wife's son, to whom she had left her community prop-

[16]*See Carlson v. Carlson,* 11 Cal.3d 474, 479, 521 P.2d 1114, 113 Cal.Rptr. 722 (1974), *cert. denied,* 419 U.S. 1105 (1975).

erty interest, sued for that portion of the bonds. This Court determined that the "clear purpose of the regulations is to confer the right of survivorship on the surviving co-owner," *id.*, at 668, thus preempting state community property law and depriving the wife of her testamentary right. The Court noted, as in *Wissner,* that there was a legitimate purpose in having the bonds issued in joint tenancy, as it provided a "convenient method of avoiding complicated probate proceedings," rendering the bonds an "inducement" to help manage the national debt. *Id.*, at 669.

Again, this decision indicates the weakness of the United States' argument in the instant case. Not only was the preempting provision one means of fulfilling a national policy, but it was a specific provision, detailing clearly that "the survivor will be recognized as the sole and absolute owner." 31 C.F.R. §315.61, as quoted *id.*, at 667 n. 5. By contrast, the policy in this case is not directed at ensuring that the working spouse must receive the benefits of his working years, since the Act was designed to assist the families of workers as well. Furthermore, there is no specific provision in the Act comparable to the Treasury Department regulation which explicitly denominated that the survivor receive the bonds.[17]

[17]In a case considering the same regulations, this Court upheld the community interest while emphasizing the importance of state law in evaluating claims which would result in the loss of that interest. The Court said:

> [I]n applying the federal standard we shall be guided by state law insofar as the property interests of the widow created by state law are concerned. It would seem obvious that the bonds may not be used as a device to deprive the widow of property rights which she enjoys under Washington [community property] law and which would not be transferable by her husband but for the survivorship provisions of the federal bonds.

Yiatchos v. Yiatchos, 376 U.S. 306, 309 (1964).

These two decisions involve situations considerably different than that in this case. There is no provision which clearly and concisely delineates the husband in this instance as the sole recipient of the retirement benefits. Unlike in *Wissner* and *Free*, the nonemployee spouse will be deprived of the fruits of her labor; it is a loss considerably greater than those experienced in *Wissner* and *Free*. No national policy is furthered by depriving the nonemployee spouse of her interest, and state policy is specifically countered. *Wissner* and *Free* support Respondent's position; Congress has not here spoken with "force and clarity."

IV

PREEMPTION WILL PROVIDE RETIRED WORKERS WITH AN UNNECESSARY WINDFALL AT THE EXPENSE OF THEIR NONEMPLOYEE SPOUSES.

Petitioner suggests finally (Pet.Br. 19-20) that equitable considerations mitigate in his favor. In fact, justice can only be effected by permitting California to apply its community property rules. Otherwise, Respondent will be left solely dependent on alimony as a source of income. Regardless of whether this meets her basic needs, there is no reason that she should receive a lesser portion than does her husband. Furthermore, in at least one community property state, Texas, alimony cannot be awarded "for the wife after a judgment of divorce has been entered." *Francis v. Francis*, 412 S.W.2d 29, 32 (Tex. 1967); Vernon's Ann.Tex.Civ. Stat., Art. 2328b-1, Sec. 2(6), Art. 2328b-3, Sec. 7. In that state, therefore, if these benefits are not

subject to a community property division, nonemployee spouses will be left to depend solely on public assistance, while their husbands will have the full amount of railroad benefits.

Petitioner supports his equitable argument by noting that, in this particular instance, his wife will have Social Security benefits based on her work record, and suggests that to provide her with half the couple's railroad retirement benefits would work a grave injustice. (Pet.Br. 20.) This position, however, ignores a key point. Under the Social Security Act, husbands are entitled to a divorced spouse's benefit. 42 U.S.C. §402(b)(1)(G); *Oliver v. Califano*, CCH UNEMP. INS.REP. ¶15,244 (N.D.Cal. 1977).[18] Consequently, Petitioner will be eligible for a divorced spouse's Social Security benefit in addition to his portion of the couple's railroad retirement benefits. The suggestion that he will be left in virtual poverty, while his wife will have benefits from multiple sources, is without merit.

By contrast, preemption of her interest would have extraordinarily inequitable results. In this particular case, she would at least have Social Security benefits,

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[18]In *Oliver*, the district court found that the differential treatment of male and female divorced spouses, with the former required to demonstrate that at least half of his support was derived from his wife in order to be eligible for benefits, 42 U.S.C. §402(c)(1)(C), was a denial of equal protection. Consequently, the one-half support requirement has been judicially eliminated so that a divorced husband is now automatically entitled to benefits based on his wife's Social Security covered employment. *Oliver*, a class action, was not appealed. As of January 1, 1979, the requisite 20-year marriage period will be reduced to ten years. Pub.L. 95-216, §337(c) (December 14, 1977).

but he would have all of the railroad benefits plus a divorced spouse's Social Security benefit. The particular facts of this case should not be controlling, however, for there will be many more couples in which the wife will have no work record of her own on which to fall back.[19] One purpose of community property laws is the recognition of the considerable input of the nonemployee wife to the marriage, an input which cannot be measured by mere reference to paid work. To allow husbands to keep the bulk of their retirement benefits would invalidate the contributions of these wives, and would implicitly suggest that they are not deserving of consideration because they did not participate in the economy. It is a suggestion which cannot be supported now, if it ever could.

Congress has not definitely stated that the community interest of wives in railroad retirement benefits should be preempted by the Railroad Retirement Act or by the Social Security Act's exceptions to the anti-attachment provision. Congress has only suggested that wives should be able to garnish federal pay and retirement benefits in order that support obligations can be met. "Unless positively required by direct enactment the courts should not presume a design upon the part of Congress. . . ." *Wetmore v. Markoe,* 196 U.S. 68, 77 (1904). That direct enactment does not exist, and policy considerations favor recognition of the wife's contribution. Respondent's interest should not be preempted.

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[19]The Bureau of Research of the Railroad Retirement Board has stated that, as of 1976, only 7% of the workers in the railroad industry were female. Consequently, in the great majority of cases, it will be the wife who lacks her own work record.

CONCLUSION.

For the reasons discussed above, the decision of the California Supreme Court should be affirmed.

Respectfully submitted,

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Service of the within and receipt of a copy thereof is hereby admitted this ..... day of July, A.D. 1978.

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